RECEIVED
DEC 18 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 80- 5708

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

ORIGINAL COPY

JOSEPH GREEN BROWN,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF FLORIDA

RESPONSE OF RESPONDENT STATE OF FLORIDA IN OPPOSITION TO PETITION FOR CERTIORARI

JIM SMITH
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
ASSISTANT ATTORNEY GENERAL

1502, THE CAPITOL
TALLAHASSEE, FLORIDA 32301
(904) 488-0290

COUNSEL FOR RESPONDENT

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

NO. 80-

Joseph Green Brown,

Petitioner,

-vs-

State of Florida,

Respondent.

RESPONSE OF RESPONDENT, STATE OF FLORIDA IN OPPOSITION TO PETITION FOR CERTIORARI

TO: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

QUESTIONS PRESENTED

I. WHETHER PETITIONER WAS DENIED HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO A REPRESENTATIVE AND IMPARTIAL JURY IN HIS TRIAL FOR A CAPITAL CRIME BY THE SYSTEMATIC AND UNJUSTIFIABLE EXCLUSION OF JURORS 1) WHO EITHER EQUIVOCATED REGARDING THEIR ABILITY TO RECOMMEND THE DEATH PENALTY AND BE IMPARTIAL, OR 2) WHO, ALTHOUGH UNABLE TO RECOMMEND DEATH, COULD BE IMPARTIAL DURING THE GUILT-INNOCENCE STAGE OF FLORIDA'S BIFURCATED CAPITAL TRIAL PROCEDURE.

II. WHETHER THE PROSECUTOR'S KNOWING FAILURE TO CORRECT THE FALSE TESTIMONY OF THE STATE'S KEY WITNESS DENIED PETITIONER HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW.

III. WHETHER THE PETITIONER WAS DENIED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW BY THE TRIAL COURT'S REPEATED WARNINGS TO THE KEY WITNESS FOR THE STATE THAT, UNLESS THE WITNESS RETRACTED HIS AFFIDAVITS SWEARING HIS TRIAL TESTIMONY TO BY UNTRUE, THE WITNESS WAS COMMITTING PERJURY AND SUBJECT TO AN EXTENSIVE PRISON TERM.

PARTIES

In the Florida Supreme Court, Petitioner, Joseph Green Brown, was the Appellant, and the State of Florida was the Appellee.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF CITATIONS iii

PRELIMINARY STATEMENT 1

JURISDICTION 1

STATEMENT OF THE CASE 2

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED . . . 1

REASONS WHY THE WRIT SHOULD NOT BE GRANTED. . . . . .

POINT I . . . . . .

POINT II . . . . . .

POINT III . . . . . .

CONCLUSION . . . . . .

CERTIFICATE OF SERVICE . . . . . .

TABLE OF CITATIONS

Adams v. Texas,
65 L.Ed.2d 581, 100 S.Ct. 2521 (1980) 12

Anderson v. United States,
403 F.2d 454 (7th Cir. 1968)
cert.den. 394 U.S. 903 16

Boulden v. Holman,
394 U.S. 478 (1968) 11

Brown v. State,
381 So.2d 680 (Fla. 1980) 2, 5, 6-7, 9-11, 14-15

Cardinale v. Louisiana,
394 U.S. 437 (1967) 5, 12, 17

Francis v. Henderson,
425 U.S. 536 (1976) 9

Fuller v. Alaska,
393 U.S. 80 (1968) 1

Giglio v. United States
405 U.S. 150 16

Gregg v. Georgia,
428 U.S. 153 (1976) 12

Heflin v. United States,
358 U.S. 415 (note 7, 1959) 1

Hysler v. Florida,
315 U.S. 411, 86 L.Ed 933 (1941) 15

Maxwell v. Bishop,
398 U.S. 262 (1970) 11

O'Steen v. State,
111 So. 725 (Fla. 1927) 17

Paramore v. State,
229 So.2d 855 (Fla. 1969) 8

Proffitt v. Florida,
428 U.S. 242 (1976) 12

Spinkellink v. Wainwright,
578 F.2d 582 (5th Cir. 1978) 8, 12

State v. Matera,
266 So.2d 661 (Fla. 1972) 16

Tagliantti v. United States,
394 U.S. 316 (note 1, 1969) 1

Wainwright v. Sykes,
433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) . . 7, 9

Wilkins v. United States,
441 U.S. 468 (1979) 1

Witherspoon v. Illinois,
39 U.S. 510, rehearing den. 393 U.S. 898 (1968) . . 4, 6, 8, 9, 11, 12

OTHER AUTHORITIES

Rules of the United States Supreme Court
Rule 20(3) 1-2

28 U.S.C. 1257(3) 1

Florida Rules of Appellate Procedure, Rule 9.330(a) . . . 17

PRELIMINARY STATEMENT

Respondent accepts that portion of the Petition for Writ of Certiorari setting forth the Citation to Opinion Below, Questions Presented, and Constitutional and Statutory Provisions involved found of pages i, 1, 2 through 5, of the Petition. In accepting the Questions Presented, Respondent does not accept any assumptions of law contained in the points as set forth.

JURISDICTION

Respondent cannot accept Petitioner's assertion that this Court's jurisdiction has been properly invoked pursuant to 28 U.S.C. § 1257(3), in that (1) Petitioner has failed to present substantial federal questions entitling him to this Court's exercise of its jurisdiction; and (2) the filing of said Petition for Writ of Certiorari is belated and contrary to the case authorities cited by Petitioner, to-wit: Wilkins v. United States, 441 U.S. 468 (1979); Tagliantti v. United States, 394 U.S. 316, (note 1,1969); Heflin v. United States, 358 U.S. 415, 418 (note 7, 1959); and Fuller v. Alaska, 393 U.S. 80 (1968); Petitioner in an unsworn letter without supporting documentation indicated that his original trial counsel and appellate counsel failed to take the requisite action to file a timely Petition for Writ of Certiorari in the United States Supreme Court. There is nothing in the Petition or the letter filed with said Petition that would indicate that Petitioner's new counsel attempted to apprise this Court of the circumstances in which Petitioner found himself nor did they try to seek leave of this Court to file a belated Petition. Under the new rules of this Court, Rule 20(3):

> The clerk will refuse to receive any Petition for a Writ of Certiorari which

is jurisdictionally out of time.

While Respondent does not pretend to suggest that the new rules of this Court be applicable to Petitioner's cause, Respondent would submit that the lame excuse presented by Petitioner's current counsel is neither persuasive nor supported by compelling authority which would entitle Petitioner to the belated review by this Court.

STATEMENT OF THE CASE

Petitioner does not accept the Statement of Facts as presented by Respondent and would tender the following facts as set forth by the Supreme Court of Florida in its opinion in Brown v. State, 381 So.2d 680 (Fla. 1980).

> The appellant, Joseph Green Brown, was convicted rape, robbery, and first-degree murder. The conviction was based primarily on the testimony of Ronald Floyd, who was with the appellant immediately prior to the crime and immediately afterwards. The facts, as revealed by Floyd's testimony, indicate that on the date of the murder, the defendant, Floyd, and a third man known as "Poochie" who has never been located, drove to a clothing shop where the murder was committed. The appellant and Poochie parked the car across the street from the shop and walked into the shop. Apparently unaware of thereason for the visit to the shop, Floyd was left sitting in the car. After waiting for approximately fifteen minutes, Floyd got out of the car and walked over to the front door of the shop. He then heard a gunshot and immediately opened the door and entered the shop. He saw Poochie standing in the doorway of what appeared to be a storage room in the rear of the shop. When Floyd looked over the counter, he saw the body of the victim on the other side of the storage room door. The three men raced out of the shop and drove speedily away. While in the car, Poochie turned to the appellant and said,"Man, you didn't have to do that."

Floyd testified that when appellant first got out of the car to cross the street and enter the clothing store, he had a bulge in his shirt which seemed to be a gun. According to Floyd, all of these events took place in the early afternoon of July 7, 1973.

At approximately 9:30 that evening, the body of the victim was discovered in the storage room of the clothing store. She had been raped and murdered. On the evening of and subsequent to the murder, the defendant and Floyd robbed a couple in a motel and appellant sexually assaulted the female. The following day, the appellant turned himself in to law enforcement officers for the motel robbery.

A verdict of guilty was returned by the jury and an advisory recommendation of a sentence of death was rendered. Appellant was adjudged guilty and sentenced to death on July 3, 1974. On appeal, appellant seeks a new trial on the grounds that: (1) after the trial, Floyd denied that his testimony was true although he ultimately reaffirmed the truth of his testimony; (2) the prosecuting attorney failed to furnish Floyd's statements pursuant to rule 3.220(a), Fla.R.Crim.P.; (3) the state failed to inform appellant's counsel that Floyd's testimony was given in return for favorable consideration in criminal matters pending against him; (4) the appellant was denied a fair trial by an impartial jury due to the systematic exclusion of prospective jurors who voiced opposition to the death penalty; and (5) the appellant was denied a fair trial by an impartial jury due to the prejudicial effect of admitting testimony of other unrelated offenses.

[381 So.2d 691-692]

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I.

Petitioner on appeal to the Florida Supreme Court raised in Point IV of his direct appeal the issue of whether he was denied a fair trial by an impartial jury as required by the Sixth and Fourteenth Amendment of the United States Constitution due to the systematic exclusion of effective jurors who voiced opposition to the death penalty.

The Florida Supreme Court concluded that the trial court had followed the dictates of Witherspoon v. Illinois, and that the one juror whose exclusion was challenged by Petitioner's trial counsel was properly excluded. The court also found that as to nine other prospective jurors who were excluded, said exclusion was made without objection by defense counsel and therefore without a timely objection, Petitioner was precluded from complaining about the correctness of said exclusion of prospective jurors.

II.

Petitioner's second point for review was briefed in Point III of his direct appeal to the Florida Supreme Court wherein he alleged that a new trial should have been granted due to tne State's alleged failure to inform Petitioner's counsel that the testimony of the State's key witness, Ronald Floyd, was given in return for favorable consideration in this and other criminal matters pending against Floyd.

The Florida Supreme Court in resolving said issue contrary to Petitioner found that there was nothing in the record to suggest that the State did in fact make such promises,

and moreover:

> Although he had an opportunity to do so at the evidentiary hearing on the matter, Appellant offered no testimony to substantiate the affidavit. By remaining silent while a witness testifies in a manner wholly inconsistent with the State's view of the facts, we do not believe that the prosecution engaged in the "deliberate deception of the court and jurors" which is necessary to reverse a conviction on these grounds. Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

[381 So.2d at 693]

III.

Petitioner's third issue for review argues that the trial court in its demeanor, method, and manner violated Petitioner's right to due due process in that the trial court pressured the recanting key witness for the State to renounce his affidavit exculpating Petitioner with threats of possible perjury charges. Petitioner admits that said point was raised for the first time in his Petition for Rehearing before the Florida Supreme Court and as such, Respondent would submit that the issue is not properly been before the State appellate court and therefore this Court's decision in Cardinale v. Louisiana, 394 U.S. 437 (1969) controls.

REASONS THE WRIT
SHOULD NOT BE GRANTED

I.

Petitioner goes through a brief recital of why a sufficient federal question has arisen by the Florida Supreme Court's denial of Petitioner's Witherspoon claim and asserts:

> Since Florida has the largest death row in the country (142 people) and is sentencing people to death at the rate of three each month, this Court should grant certiorari to correct the Supreme Court of Florida and establish firmly the federal constitutional limitations on death qualifying juries in that state.

[Petitioner's Petition - 13]

Petitioner breaks down his argument into three parts: (1) the exclusion of equivocating jurors, (2) the exclusion during the guilt-innocence stage of those who could fairly pass upon guilt-innocence and whose difficulties lay only with the penalty, and (3) defense counsel's failure to object. Respondent would admit that the crucial issue before this Court is whether the failure on the part of Petitioner's trial counsel to object to the exclusion of nine of the ten individual jurors excused at trial, bars Petitioner in the instant Petition from complaining about whether said jurors were excused in violation of Witherspoon v. Illinois, 391 U.S. 510, rehearing denied 393 U.S. 898 (1968).

The Florida Supreme Court in addressing this issue held:

> Appellant charges that he was denied a fair trial by impartial jury due to the systematic exclusion of prosepective jurors who voiced opposition to the death penalty. Witherspoon v. Illinois, 91 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2nd 776 (1968). We disagree. Nine of the ten jurors who were excluded had been excluded before the Appellant made his objection on this ground. In Paramore v. State, 229 So.2d 855 (Fla.1969) vacated on other grounds, 408 U.S. 935 , 92 S.Ct.

2857, 33 L.Ed.2d 751, (1972) we responded to a similar argument by stating:

> If defendant objects to a prospective juror or being excused he should make his objection before the juror is excused . . . . When these three prospective jurors expressed their conviction against the infliction of the death penalty, Appellant's attorney made no effort to qualify them for service. Perhaps he did not want them for some other reason. It was not the duty of the trial court to take other steps toward attempting to qualify the veniremen and the Witherspoon case, supra, should not be construed as imposing this additional duty upon the trial court in the absence of any expression of a desire by defense counsel to keep the prospective jurors. . . The Appellant is in no position to complain in the instant case because no objection was interposed . . . . Id at 858.

[Brown v. State, 381 So.2d 690, 693, 694 Florida, 1980]

Respondent would submit that the Florida Supreme Court's decision is in compliance with this Court's decision in Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) wherein this Court held that a defendant who did not contemporaneously object and whose attorney did not contemporaneously object, during the defendant's state trial to the involuntariness of the defendant's confession waived his objection and could not thereafter raise the issue for habeas corpus review. Similarly, in the case at bar where Petitioner's trial counsel at no point objected to the excusing of nine of the ten jurors for cause based on their proclivity to be against capital punishment and unable to impose a verdict of guilt, the Wainwright v. Sykes, supra,

rationale is applicable. Florida requires a contemporaneous objection to the exclusion of jurors by defense counsel at the time of exclusion. See, Paramore v. State, 229 So.2d 855 (Fla. 1969). Moreover, in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978) that court held:

> During a voir dire examination of the jury, counsel for Spinkellink contemporaneously objected to the exclusion for cause of two veniremen in question. His counsel did not however, raise any of these contentions regarding the veniremen exclusion on direct appeal to the Florida Supreme Court. Additionally, although a court reporter reported the voir dire testimony, neither Spinkellink nor his trial counsel requested the court reporter to transcribe it, and his trial counsel even expressly excluded the voir dire examination from testimony designated to be transcribed for the appellate record. The Florida Supreme Court on a collateral review, Spinkellink v. State, supra, and the District Court below, both relying on Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) found that Spinkellink had waived his contentions regarding the exclusion of the two veniremen.
>
> [Id. at 591]

In the instant case, Petitioner as to nine of the ten jurors excluded made no effort at all to qualify these witnesses before they were excluded but rather acceded to the wishes of the State. Petitioner's trial counsel could have asked any relevant question in an attempt to qualify these prospective jurors. He did not. Once the goverment makes a showing that the person is not qualified to serve as a juror, it is incumbent upon the defense to clarify the matter by showing the juror is not subject to removal or suffer the consequences. In nine of the ten instances in the instant case, Petitioner's trial counsel did not even attempt to demonstrate that the juror was not disqualified under Witherspoon v. Illinois, supra. To suggest now that counsel not be required to make a contemporaneous objection to the

exclusion of said individuals would violate this Court's decisions in Wainwright v. Sykes, supra, Estelle v. Williams, 425 U.S. 501 (1976); and Francis v. Henderson, 425 U.S. 536 (1976).

Petitioner attempts to preserve his alleged Witherspoon complaint regarding the nine unobjected to excused jurors by stating:

> At Petitioner's trial, moreover, there was no failure. Remedial measures were still possible when counsel objected on all of the grounds raised in this Petition. Petitioner's rights certainly were not waived by his counsel's mere delay.

[Petitioner's Petition - 20]

Respondent would submit to the contrary. This Court, in Wainwright v. Sykes, supra, recognized Florida's contemporaneous objection rule, and to suggest now that a defense counsel may wait until said jurors have been excused to challenge their excusal forever denies the State and the reviewing court the opportunity to address the challenges made by a given defendant. Petitioner's trial counsel cannot simply sit idly by and not timely voice his objection to the excusing of jurors. Wainwright v. Sykes, supra.

The sole juror that was excused following a timely objection by Petitioner's trial counsel was excused correctly following the dictates of Witherspoon v. Illinois. The Florida Supreme Court in reviewing this issue noted:

> The one prospective juror who was excused after timely objection was properly excused for cause in accordance with the Witherspoon standards. During the voir dire examination of that prospective juror, the following colloquy occurred:
>
> A. I have been listening all afternoon but sitting up there I just don't think I could recommend a verdict of death. Capital punishment.

Q. (Prosecuting attorney) Well, would this stem from your feeling that you have about the death penalty?

A. Yes. I don't think I could recommend for anyone to be put to death.

Q. Regardless of the circumstances.

A. I don't think so. Life imprisonment yes, but not the death penalty.

* * *

Q. (Defense counsel) Ma'am, if I may get this just straight, I have tried to pin down exactly what it is you feel that would hinder you in your decision. Is it the fact that you might have to recomment, should we get to the second portion of this trial, the death penalty?

A. Yes, sir.

Q. That is what bother you?

A. Yes.

Q. Specifically what? And would it hinder you in reaching your decision as to guilt or innocence?

A. Well, it might if I thought I recommended guilty and he would be put to death, or whoever it was.

We have recently held that a prospective juror may be excused for cause if it is shown that he "would vote against death regardless of the facts presented or the instructions given." Jackson v. State, 366 So.2d 752, 755 (Fla. 1978). We have also upheld the exclusion of a prospective juror who said that he wouldn't know if he could find the defendant guilty where it might result in capital punishment. Williams v. State, 228 So.2d 377, 381 (Fla. 1969) vacated on other grounds,408 U.S. 941, 92 S.Ct. 2864, 33 L.Ed.2d 765 (1972). There we stated:

> As was said in Witherspoon, "the most that can be demanded of a venireman . . . is that he be willing to consider all of the penalties provided by state law . . . ." 391 U.S. at 522, 88 S.Ct. at 1777, note 21. If upon questioning

> the prospective juror says he doesn't know whether he can vote for conviction if if might mean the electric chair, then the state cannot determine his willingness to consider all penalties. Nor can it determine whether or not the veniremen's attitude toward the death penalty would prevent him from making an impartial decision as to guilt. Id. at 381 (Emphasis in original). In this case the prospective juror made it clear that her decision as to guilt or innocence might well be affected by her attitude toward the death penalty. We find that the trial court correctly followed the dictates of Witherspoon and properly excused this prosective juror.
>
> [381 So.2d 694]

In the instant case, it was made patently clear that the juror's opposition to the death penalty would prevent her from making an impartial decision as to the Petitioner's guilt and further would not enable her to consider imposition of the sentence of death. The Florida Supreme Court so found, citing to this Court's decision in Witherspoon, supra, and the record in this case supports said finding. Further, Respondent would submit that Petitioner's reliance on this Court's decisions in Boulden v. Holman, 394 U.S. 478 (1968) and Maxwell v. Bishop, 398 U.S. 262 (1970) are distinguishable from the case at bar. In Boulden, supra, this Court determined that there were at least eleven instances where the Witherspoon rule had been violated. In each of the circumstances, there was nothing more than a yes-no type response to inquiries made as to whether a given prospective juror believed in capital punishment or would ever inflict the death penalty in any case. Similarly, in Maxwell v. Bishop, supra, the inquiries made therein generated tentative answers in terms of "might" and"thought"as opposed to the definitive responses obtained from the one juror whose excusal is under scrutiny herein. Thus, Boulden and Maxwell do not support Petitioner's claim

that the juror in the instant case was improperly excluded.

Petitioner's last assertion is that the exclusion of the jurors in the case at bar was unnecessary because:

> (1) The guilt/innocence stage of Petitioner's trial was, and by statute had to be, distinct from the sentencing stage under the Florida scheme and,
>
> (2) The jury in Florida merely recommends a sentence and the court could have inquired of the jurors recommending life imprisonment whether their recommendation resulted from a refusal to recommend the death sentence in any imaginable case or from their weighing of the aggravating and mitigating circumstances in the case at bar--and then ignored the votes of those who were unalterably unable to recommend death.

[Petitioner's Petition 15-16]

Respondent would first submit that this particular argument was never presented to the Florida Supreme Court for review, but rather, has been raised for the first time in Petitioner's Petition for Writ of Certiorari. Therefore, this Court's decision in Cardinale v. Louisiana, 394 U.S. 437 (1969) controls.

Assuming arguendo, that this issue is properly before this Court for consideration, Respondent would submit that this Court has rejected a similar if not identical claim of this nature in Proffitt v. Florida, 428 U.S. 242 (1976) and Gregg v. Georgia, 428 U.S. 153 (1976); see Spinkellink v. Wainwright, 578 F.2d at 592 through 596 (5th Cir. 1978).

Finally, Petitioner's reliance on this Court's decision in Adams v. Texas, 65 L.Ed.2d 581, 100 S.Ct. 2521, (1980) is totally inappropriate. In Adams v. Texas, this Court held that the exclusion of prospective jurors on the

ground that they were unwilling or unable to take the statutory oath to the effect that a mandatory penalty of death or life imprisonment would not have effected their deliberation on any issue or fact contradicted the Sixth and Fourteenth Amendments. Specifically, the court held:

> We repeat that the State may bar from jury service those whose beliefs about capital punishment will lead them to ignore the law or violate their oaths. But in the present case, Texas has applied Section 12.31(b) to exclude jurors whose only fault was to take their responsibility with special seriousness or to acknowledge honestly that they might or might not be affected. It does not appear in the record before us that these individuals were so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its constitutionally valid death penalty scheme.

[65 L.Ed.2d at 593]

Based on the foregoing, Respondent would respectfully submit that Petitioner has failed to demonstrate that the Florida Supreme Court has rendered in its opinion a decision contrary to this Court's decision in Witherspoon v. Illinois, supra.

II.

Petitioner asserts that the prosecutor failed to disclose to the defense that he had promised Ronald Floyd, the "only" person able to place Petitioner at the murder scene, that he, Floyd, would not be prosecuted for the Barksdale murder if inter alia, Floyd testified against Petitioner. The crux of the problem herein is that the prosecutor "allowed Floyd to testify without correction or contradiction that no such promise had been made, and that he asserted in his closing argument that he had not offered Floyd immunity." [Petitioner's Petition 21]. The Florida Supreme Court in reviewing this point on direct appeal concluded that the evidence presented was insufficient to support Petitioner's allegations. Specifically, the court noted:

> Appellant next argues that he is entitled to a new trial on grounds that the State failed to inform defense counsel of the testimony of the State's key witness, Floyd, was given in return for favorable consideration in this and other criminal matters pending against Floyd. Floyd testified at trial that the State had given him no promises of favorable consideration in this case or any other case as an inducement for his testimony against Appellant. This testimony is consistent with the State's version of the pre-trial discussion with Floyd. The Appellant's claim is based on statements made in the March, 1975, affidavit of Floyd which indicated that the State had promised favorable treatment in exchange for his testimony against the Appellant. Although Floyd retracted part of that statement at the evidentiary hearing on the matter, at the same time he reaffirmed his claim as to promises of favorable treatment. At the same hearing, the State denied that any promises were made. The Appellant's claims rest solely on the affidavit of Floyd. There is nothing in the record to suggest that the State did in fact make such promises. Although he had an opportunity to do so at the evidentiary hearing on the matter, Appellant offered no testimony to substantiate the affidavit. By remaining silent while a witness testifies in a manner wholly inconsistent with the State's view of the facts,

> we do not believe that the prosecution engaged in "deliberate deception of a court and jurors" which is necessary to reverse a conviction on these grounds. Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 105 (1972).
>
> [381 So.2d at 693]

Respondent would invite this Court's attention to its decision in Hysler v. Florida, 315 U.S. 411, 86 L.Ed. 933 (1941):

> The essence of Hysler's claim before the Supreme Court of Florida was that his conviction was secured by unconstitutional means, that Baker was coerced to testify falsely by responsible State officials. The court had to judge the substantiality of this claim on the basis of al that was before it, namely, the Petition with its accompanying affidavits and the record of prior cases arising out of the same crime. The court concluded that Hysler's proof did not make out a prima facie case for asking the trial court to reconsider its judgment of conviction. However, ineptly the Florida Supreme Court may have formulated the grounds for denying the application, its action leaves no room for doubt that the court deemed the Petitioner's claim without substantial foundation. We construe its finding that the "Petition" did not show the responsibility of the State officials for the alleged falsity of Baker's original testimony to mean that the Petitioner had failed to make the showing of substantiality which, according to the local procedure of Florida, was necessary in order to obtain the extraordinary relief furnished by the writ of error quorum nobis and our independent examination of the affidavits upon which his claim was based leaves no doubt that the findings of insubstantiality was justified. It certainly precludes a holding that such a finding was not jsutified. . .
>
> Our ultimate inquiry is whether the State of Florida had denied to the Petitioner the protection of due process clause. The record does not permit the conclusion that Florida has deprived him of his constitutional rights.
>
> [86 L.Ed. 939]

Respondents would submit that the instant case as

indicated by the Florida Supreme Court is distinguishable from Giglio v. United States, supra. As noted in State v. Matera, 266 So.2d 661 (Fla. 1972):

> Credibility of a witness, as such, like sufficiency of the evidence, has not been recognized as a ground supporting collateral attack on a conviction. Even a petition alleging perjury of a witness at trial is insufficient unless it is also alleged that the perjured testimony formed the basis for the conviction, was knowingly used by the prosecution, and was unknown to defendant at the time of the trial or during appeal. The somewhat related ground of knowing suppression of evidence by the State must also be accompanied by allegations that the evidence suppressed was essential to the conviction and that defendant was unaware of its existence or unable to obtain its disclosure . . . .
>
> [266 So.2d 663-664]

See, Anderson v. United States, 403 F.2d 451, 454 (7th Cir. 1968) cert.denied 394 U.S. 903.

While the testimony in the case at bar is conflicting as to whether the State "promised" Floyd consideration for his testimony, there is no indication in the record that defense counsel was unaware of said alleged promises, or that said promises had anything to do with Floyd's agreement to testify, since it was proffered by the State that said negotiations were completed prior to Floyd's agreement to testify. There were no promises as to penalty based on whether Appellant was to testify and that indeed, any "promise" in the case at bar regarding the State's not prosecuting Floyd for the Barksdale murder was predicated of Floyd's testifying truthfully and Floyd's successfully passing a polygraph test.

Based on the foregoing, Respondent would respectfully submit that Petitioner has failed to present sufficient facts and a cogent claim which would entitle him to this Court's review on his second issue.

III.

Petitioner's third point for consideration is not properly before this Court in that Petitioner belatedly raised this point on a Petition for Rehearing on direct appeal following the Florida Supreme Court's decision rendered January 31, 1980. Petition for Rehearing was summarily denied April 21, 1980. Thus, in attempting to address this issue on rehearing, Petitioner has failed to properly bring this issue before the highest State appellate court for review and therefore the Florida Supreme Court has not had an opportunity to make a determination as to the validity of Petitioner's claim. In Cardinale v. Louisiana, 394 U.S. 437, this Court opined:

> In view of Petitioner's admitted failure to raise the issue he presents here in any way below, the failure of the State court to pass on this issue, the desirability of giving the State the first opportunity to apply its statute on an adequate record, and the fact that a federal habeas remedy may remain if no State procedure for raising the issue is available for Petitioner, the writ is dismissed for want of jurisdiction.

[Id. at 439]

Pursuant to the Florida Rules of Appellate Procedure applicable at the time of Petitioner's pleadings, Rule 9.330(a) reads in part:

> A motion for rehearing or for clarification of decisions may be filed within 15 days of an order or within such other time set by the court. The motion shall state with particularity the points of law or fact which the court has overlooked or misapprehended. The motion shall not reargue the merits of the court's order.

Further, points not presented to the trial court nor referred to in arguing on appealwill not be decided by an appellate court on rehearing. O'Steen v. State, 111 So. 725 (Fla. 1927).

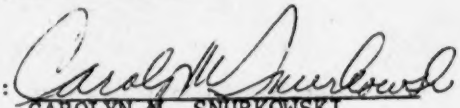
Based on the foregoing, Respondent would submit that Point III of Petitioner's pleading is not subject to review by this Court.

CONCLUSION

Based on the foregoing reasons, Respondent would respectfully urge that Petitioner's Petition for Writ of Certiorari be denied.

Respectfully submitted:

JIM SMITH
ATTORNEY GENERAL

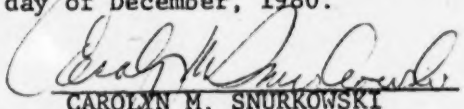
By: 
CAROLYN M. SNURKOWSKI
Assistant Attorney General

THE CAPITOL, Suite 1502
Tallahassee, Florida 32301
(904) 488-0290

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished JOHN CHARLES BOGER, Suite 2030, 10 Columbus Circle, New York, New York, 10019 via United States mail on this 17th day of December, 1980.


CAROLYN M. SNURKOWSKI
Assistant Attorney General